IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.179 of 2005

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Mormugao Port Trust ...Petitioners

v/s.

M/s.Associated Constructions ...Respondents

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Mr.Umesh Shetty i/b Mulla & Mulla & CBC for the Petitioners.

Mr.U.P.Bobade i/b Hemant Sethi for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 11TH OCTOBER,2005

P.C.:

1. By this petition filed under Section 34 of the Arbitration Act the Petitioners challenge the award made by the Arbitral Tribunal.

2. First challenge to the award is that the learned Arbitrators by award against claim No.4 have awarded an amount of Rs.1,50,000/- to the Respondents holding that delay of three months is attributable to the Petitioners. The entire discussion in the award on this aspect of the matter is to be found at Item (d) against the claim No.4. It reads as under:-

> (d) Under Utilised O.H.Rs.11,67,000/-
> The Claimant had agreed to the extended
> Date delay after extend date is 6 months
> Most of the delays are over lapping
> However a delay of about 3 months
> Could be considered as attributable to
> Respondents. A compensation of Rs.50,000/-
> Per months for 3 months is

awarded Rs.1,50,000/-

3. The Respondents, who were the claimants, were claiming that the Petitioners are responsible for the delay of six months and therefore the Respondents are entitled to compensation for the entire period of six months. The Petitioners were disputing this position that any part of the delay is attributable to the Petitioners. On this the arbitral tribunal has recorded a finding that the delay of three months is attributable to the Petitioners. Really speaking the finding quoted above cannot be termed as a definite finding. A judicial or quasi-judicial tribunal is obliged to record a definite conclusion before making a party liable to make payment on the basis of that finding. Perusal of the finding quoted above shows that even the arbitral tribunal was not absolutely sure whether three months delay can be attributable to the Petitioners. In any case, the arbitral tribunal has made the award for payment of Rs.1,50,000/- against the Petitioners by recording a finding that three months delay is attributable to the

Petitioners. Section 31(3) of the Arbitration Act casts a mandatory statutory duty on the arbitral tribunal to state the reasons upon which the award is based. Thus, the award violates the mandatory statutory requirements of Section 31(3) and therefore is liable to be set aside.

4. The arbitral tribunal by its award against claims Nos. 1, 2 and 3 has awarded an amount of Rs.4,52,485 for 452 sq.ft. of extra built up area. The learned Counsel for the Petitioners states that in the statement of claim the Respondents had claimed only 156.830 sq.ft. as extra built up area and therefore the award made by the learned arbitral tribunal is in excess of what is prayed for in the statement of claim. It was submitted that though it is true that in the statement of claim, the claim for lesser area was made, the arbitral tribunal made the award on the basis of the Commissioner’s report. The measurements that were given in the Commissioner’s report were accepted by both the parties and it was therefore submitted on behalf of the Respondents that the arbitral tribunal was justified in awarding the amount for an area of 452 sq.ft. In my opinion, even if the parties accepted

the measurements in the Commissioner's report, in the absence of any amendment in the statement of claim claiming amount for extra built up area, the arbitral tribunal could not have made the award for that area. Because it is possible that one of the reason why the Petitioners accepted the measurements given in the Commissioner's report can be that there is no amendment in the statement of claim, therefore, maximum that can be awarded in favour of the Respondents is for 156.830 sq.ft. In any case, in my opinion, in the statement of claim only claim is made in relation 156.830 sq.ft. was a relevant aspect and therefore, the arbitral tribunal being quasi-judicial authority was under a duty to apply its mind to that relevant aspect. Failure of the arbitral tribunal to apply its mind to the relevant aspect in recording a finding amounts to non-application of mind and therefore, the finding recorded by the arbitral tribunal suffers from violation of principles of natural justice, and therefore, the award made and the finding recorded against excess built-up area is also liable to be set aside.

5. The arbitral tribunal has held that deduction of

Rs.3,00,000/- as liquidated damages by the Petitioners is invalid and has, therefore, directed the Petitioners to make payment of that amount. The discussion and finding in that regard is to be found in paragraph 2 of the award, which reads as under:-

> 2. On Liquidated damages it is an admitted position that no notice was given to contractor to give opportunity to present his say. There is no certificate by the Architect that the extended time limit was rational and the work could be completed as per the prescribed time limit. The Respondents just deducted Rs.3,00,000/- as liquidated damages, in the final bills without complying with the principles of natural justice. Under the circumstances the Respondents are not entitled to deduct Liquidated Damages at the end in the final Bill.

6. Perusal of the above quoted paragraph shows that the arbitral tribunal has held that the deduction of liquidated damages is invalid, because no notice was

given to the Respondents to show cause why the amount should not be deducted as liquidated damages. The damages have been deducted by the Petitioners under Clause 38 of the contract between the parties. The relevant portion of the contract reads as under:-

> 06. Liquidated damages for Delay:
> 0.5% of value of contract/day subjected to maximum of 5% of value of contract."

> "38) a) Liquidated Damages for Delay
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> If the Contractor shall fail to complete the works within the time prescribed by clause 34 hereof or extended time then the Contractor shall pay to the Employer the sum stated in the Tender as Liquidated Damages for such default and not as a penalty for every day or part of a day which shall elapse between the time prescribed by Clause (4) hereof or extended time as the case may be and the default certified completion of works. The Employer may without prejudice to any other

method of recovery deductable amount of such extent from the money that stands due or which may become due to the Contractor. The payments or deduction of such damages shall not relieve the Contractor from his obligations and liabilities under the Contract.

b) Reduction of Liquidated Damages.

If before the Completion of the whole of the works any part of the works has been certified by the Architect as completed pursuant to Clause 39 hereof and occupied and used by the Employer the liquidated damages for delay shall for any period of delay after such certification be reduced in the proportion which the value of the part so certified bears to the value of whole or works."

7. Perusal of the above quoted clause shows that the contract permits the Petitioners to deduct the liquidated damages for delay and the term in the

contract does not require any show cause notice to be given. It was submitted on behalf of the Respondents that the amount could not have been deducted as liquidated damages because the Respondents themselves had released the amount of Rs.49,000/-, which was deducted by them on the same account earlier and therefore according to the Respondents the deduction of the amount was not justified. This ground was specifically raised by the Respondents against the deduction of the amount as liquidated damages. But the arbitral tribunal has not accepted that ground, instead the arbitral tribunal has given a ground which was not raised by the Respondents. But the ground given by the arbitral tribunal is totally unfounded. The Supreme Court in its judgment in the case of Oil & Natural Gas Corporation Ltd. v/s Saw Pipes Ltd., (2003) 5 SCC 705 has held similar clause in the contract to be valid and also held that amount of liquidated damages can be deducted under the similar clause.

8. It is, thus, clear from what has been observed above that the award impugned in the petition has been made in clear violation of the mandatory statutory requirements and therefore, is liable to

be set aside.

9. In the result, therefore, the present petition succeeds and is allowed. The award impugned in the petition is set aside. The Respondents are directed to pay costs of this petition as incurred by the Petitioners.

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